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No. 08-532

Supreme Court, U.S.
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In The Supreme Court of the United States

LEE CRANMER,

Petitioner,

vs.

TUCSON POLICE DEPARTMENT, CITY OF TUCSON, TYCONIC, INC., CHIEF RICHARD MIRANDA, DET. M. LENARD and JOHN DOE LENARD, OFC. MARK SPELLMAN and JANE DOE SPELLMAN, KATHLEEN DAILY and JOHN DOE DAILY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The determinative question on the merits of the summary judgment appeal was whether there was probable cause for Appellant Cranmer's arrest. The court of appeals upheld the lower court's determination that, as a matter of law, the Tucson Police Department had probable cause to arrest Cranmer. Cranmer's attorney's alleged "abandonment" of Cranmer did not affect the fact of probable cause. Did the court of appeals abuse its discretion when it denied Cranmer relief pursuant to Federal Rule of Civil Procedure 60(b)(6) for alleged attorney abandonment when its finding of probable cause was dispositive and thus Cranmer could not show injury?

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DECISIONS BELOW

Cranmer requests this Court review the May 14, 2008 Memorandum Decision of the Ninth Circuit Court of Appeals which affirmed the District Court's Order denying Cranmer's Rule 60(b)(6), Fed. R. Civ. P. Motion for Relief from Judgment. The decision is unpublished.

The Memorandum Decision is not republished here, as it is included in Cranmer's Appendix to his Petition for Writ of Certiorari.

BASIS OF JURISDICTION

The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This Petition for Writ of Certiorari involves Rule 60(b)(6), Fed. R. Civ. P., which is set out in full in Appendix E to Cranmer's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In April 2003 Cranmer filed separate complaints against the City of Tucson and Tyconic, Inc. in

Arizona Superior Court, both arising from his arrest in April 2002 by the Tucson Police Department for theft and fraudulent schemes and artifices. Against the City he alleged a violation of the Fourth Amendment of the United States Constitution and state law claims of malicious prosecution, false arrest, intentional infliction of emotional distress, negligence, and defamation. The two cases were removed to federal court and consolidated.

Cranmer was arrested after an investigation in which police officers learned facts from credible sources that led them to believe that Cranmer had willingly participated in fraudulent schemes with his then-wife, Jeanie Hering. For example, prior to Cranmer's arrest the police learned that large items of stolen furniture were delivered to the home that Cranmer and Hering shared; that Cranmer's flight lessons were paid for by stolen credit cards; that large, fraudulently received sums were deposited into Cranmer's bank account; that Cranmer provided misinformation to investigators about Secret Service or FBI reports and investigations; that Cranmer provided misinformation about the name of his attorney who turned out to have no knowledge of Cranmer; that Cranmer repeatedly failed to return calls from a bank fraud investigator; and that Cranmer provided incorrect information to his bank that resulted in reimbursement to his account.

Evidence was later discovered indicating that Cranmer had been misled by Hering. Cranmer was never formally charged with a crime.[1] Hering, arrested the same day as Cranmer, was indicted by a grand jury and was ultimately convicted.

The district court's scheduling order required the parties to disclose expert witnesses and reports by August 20, 2004. After the City stipulated to an extension, Cranmer filed his Notice of Expert Disclosure on August 27, 2004. He listed Jerry Goddard as a police procedures expert, but failed to provide Goddard's report or qualifications as required by Fed. R. Civ. P. 26(2)(B) and by the court's order.

Both Cranmer and bank investigator Steve Weaver were deposed in the fall of 2004. Cranmer's attorney, David Bjorgaard, attended both depositions. City and Tyconic filed motions for summary judgment on December 14, 2004. Cranmer filed a motion to extend time to file his oppositions, which was granted. The basis of the motion was that Mr. Bjorgaard was out of town for the holidays and he and his son had both been sick. Cranmer was given until February 11, 2005, to file his oppositions. No response was filed by February 11 and no motion for leave to file oppositions past the deadline was filed. On

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[1] Cranmer states that there was a judicial finding that he was wrongfully arrested and charged. No evidence of this statement was ever presented to the district court or to the Ninth Circuit Court of Appeals and no such evidence is presented in Cranmer's Petition for Writ of Certiorari.

February 18, 2005, City and Tyconic filed a joint request for summary disposition of their motions. The Court did not respond to this request. Cranmer did not file his opposition to the City's Motion for Summary Judgment until June 2, 2005.

Cranmer's opposition did not dispute any fact set forth in the City's motion. The Court struck the opposition for being "inexcusably late." Cranmer filed a motion to reconsider. The Court vacated its order and ordered Cranmer to show cause why his oppositions should not be stricken for failure to comply with the rules and with the Court's orders. Mr. Bjorgaard filed a memorandum on July 1, 2005, explaining that his failure to file timely oppositions was due to his personal circumstances and was not the fault of Cranmer.

On June 22, 2005, attorneys David Lipartito and Jeffrey Rogers filed notice of association with Mr. Bjorgaard as co-counsel for Cranmer. Cranmer's new counsel learned that Jerry Goddard had been consulted by Mr. Bjorgaard earlier in the case, but had not prepared a report. A review of Mr. Goddard's affidavit revealed that at the time he was retained by Mr. Bjorgaard, he was provided with the same documents that were reviewed by, and formed the basis of the timely-filed report provided by the City's police procedures expert. New counsel contacted Mr. Goddard to request he prepare a report.

On September 27, 2005, the Court granted City's Motion for Summary Judgment. The Court again

ordered Cranmer's responses stricken as untimely. The Court's Order noted, however, that it had read Cranmer's responses and that even if they had been taken into consideration, it would not have changed the outcome.

On October 7, 2005, Cranmer filed his "Motion for New Trial Under Rule 59(a)/Motion to Correct or Amend Judgment Under Rule 59(e)/Motion for Relief From Judgment Under Rule 60(b), or Alternative Motion for Reconsideration," with attached exhibits. One of the exhibits was the affidavit and report of Jerry Goddard that had been provided to Cranmer's new counsel on September 20, 2005. The City had not been advised of the pending disclosure of a report from Goddard, nor had Cranmer filed a motion with the Court seeking a disclosure deadline extension, Fed. R. Civ. P. Rule 56(f) relief, or leave to file a supplement to the record. Goddard's report opined that Cranmer was arrested without probable cause. The other exhibits, which Cranmer claimed would preclude the granting of summary judgment, included an excerpt from Cranmer's October 2004 deposition and an excerpt from Jeanie Hering's May 2002 grand jury hearing.

Cranmer claimed that his deposition excerpts showed that he had actively attempted to investigate the fraud himself, and that he is a person of impeccable character. As for the grand jury excerpt, Cranmer's only stated reason for wanting the court to consider it was for a statement made by Detective Lenard which Cranmer mischaracterized. In the

Motion for a New Trial, Cranmer stated that Det. Lenard testified before the grand jury that "she did not know whether Cranmer was aware of or involved in [Hering's] activities, just that he might have been." However, a review of the transcript reveals that Det. Lenard actually testified that Cranmer "might or might not" have had any awareness of Hering's fraudulent payments to the two flight schools. This statement hardly indicates lack of probable cause for Cranmer's arrest for a multitude of fraudulent activities, nor even for the fraud perpetrated against the flight schools. Furthermore, probable cause does not require absolute certainty, only a fair probability. *United States v. Smith,* 790 F.2d 789, 792 (9th Cir. 1986); *Brescher v. Von Stein*, 904 F.2d 572, 578 n.9 (11th Cir. 1990).

City filed an opposition. Seven months later, on May 9, 2006, Cranmer filed a Motion for Leave to Amend or Supplement Motion for New Trial. He attached docket sheets, motions, and orders from other cases that he asserted showed attorney Bjorgaard had "abandoned" other clients as a result of a disability (depression). City filed an opposition noting that none of Cranmer's exhibits evidenced that a "disability" was the cause of Bjorgaard's failure to comply with discovery in those cases, and in any event, there was probable cause for Cranmer's arrest.

On July 7, 2006, the Court denied Cranmer's "Motion for New Trial Under Rule 59(a)/Motion to Correct or Amend Judgment Under Rule 59(e)/Motion for Relief From Judgment Under Rule 60(b), or Alternative Motion for Reconsideration," as well as

his Motion to Amend the Motion for New Trial. Cranmer then filed his Notice of Appeal to the Ninth Circuit Court of Appeals.

The Court of Appeals affirmed the district court's decision, finding that the determinative question on the merits of the summary judgment appeal was whether there was probable cause for Cranmer's arrest. The Court determined that the district court had properly concluded that probable cause to arrest Cranmer existed as a matter of law. Because the district court had entered judgment on the merits of the case, Cranmer was not entitled to relief.

The Petition for Writ of Certiorari appeals just the denial of the Rule 60(b)(6) Motion for Relief from Judgment. It does not raise any issue with regard to the denial of the Rule 59(a) Motion for a New Trial or the Rule 59(e) Motion to Correct or Amend Judgment.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. Probable cause for the arrest is the determinative issue. At the time of his arrest, the Tucson Police Department had probable cause to arrest Cranmer. Attorney David Bjorgaard's alleged "abandonment" of Cranmer is irrelevant to that issue as is Jerry Goddard's opinion that the police did not have probable cause for the arrest.

Probable cause is a matter of law and is not properly the subject of expert testimony. *United*

States v. Scholl, 166 F.3d 964, 973 (9th Cir. 1999); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2nd Cir. 1991) ("as a general rule, an expert's testimony on issues of law is inadmissible"); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) (opinion evidence about legal conclusions does not create an issue of fact sufficient to defeat summary judgment). Because "it is the responsibility of the trial judge to say whether the facts give rise to probable cause, the expressions of opinions by others are not relevant and are wholly immaterial to the decision in the case." *Carroll v. Kalar*, 112 Ariz. 595, 599, 545 P.2d 411, 415 (1976).

Bjorgaard's handling of the case is not determinative. Cranmer contends that had Bjorgaard placed Goddard's report before the court in a timely manner, the result would have been different, but the lower courts did consider that evidence and determined that it did not change the fact of probable cause. Probable cause is a complete defense to all of the claims brought by Cranmer against the City.

B. The Ninth Circuit Court of Appeals did not abuse its discretion when it upheld the denial of Cranmer's Motion for Relief from Judgment Under Rule 60(b).

As "newly discovered evidence" Cranmer pointed to excerpts from Cranmer's deposition, an excerpt from the grand jury proceedings in the Hering case, and the affidavit and report of Jerry Goddard. When moving

to have alleged newly discovered evidence considered, the movant must establish that (1) the evidence was discovered after trial; (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage; and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000); *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1093 (9th Cir. 2003).

"Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of [the motion for summary judgment] or could have been discovered with reasonable diligence." *Coastal Transfer Co. v. Toyota Motor Sales*, 833 F.2d 208, 212 (9th Cir. 1987). Cranmer's deposition was taken on October 26, 2004. The portions of it that he wished to bring to the court's attention were not "newly discovered" for purposes of the rule just because new counsel did not see it until late September 2005. The Grand Jury in the Hering case convened on May 3, 2002. The transcript cannot be considered "newly discovered" over three years later. Goddard's report was not "newly discovered." Mr. Bjorgaard retained him by at least August 2004 and gave him 700 pages of discovery to examine, including Detective Lenard's investigative file. This was long before the current attorneys for Cranmer became associated with the case in June 2005. A report from Goddard was not obtained by new counsel until September 20, 2005. In any event, Cranmer did not

ask for Rule 56(f) relief. The timing of the disclosure of Goddard's report was always under Cranmer's control.

The district court noted that even if Goddard's report had been timely produced and used in the opposition to the motion for summary judgment, it would *not* have changed the outcome. The court stated: "Much of Mr. Goddard's report is argumentative, speculative, and immaterial to the issues at hand." The court stated that even if it had taken the report into consideration, "it would not have precluded summary judgment in this case." Furthermore, only facts admissible in evidence can be relied upon by a court when ruling on a motion for summary judgment. An expert witness cannot proffer legal conclusions, including whether there was probable cause for an arrest. *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) (opinion evidence about legal conclusions does not create an issue of fact sufficient to defeat summary judgment). Goddard's opinion as to whether there was probable cause for the arrest is irrelevant.

C. To qualify for Rule 60(b)(6) relief, the moving party must show both injury and circumstances beyond its control. There was probable cause for Cranmer's arrest; he cannot show injury.

Rule 60(b)(6) allows a court to vacate a judgment for any "reasons justifying relief from the operation of

the judgment." The rule "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Neglect or lack of diligence is not to be remedied through Rule 60(b)(6). *United States v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994). A moving party must "show both injury and that circumstances beyond its control prevented timely action to protect its interests." *Lehman v. United States*, 154 F.3d 1010, 1017 (9th Cir. 1998). Here, Cranmer's arrest was based on probable cause. He cannot, therefore, show any injury as a result of the alleged attorney abandonment.

D. There is no conflict between the decision by the Ninth Circuit Court of Appeals in this case and its decision in *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002).

Cranmer argues that he is entitled to Rule 60(b)(6) relief due to his former counsel's gross negligence/abandonment. In his Ninth Circuit Court appeal brief he cited *Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002) as authority. Cranmer now claims that the ruling by the Ninth Circuit Court of Appeals in the case at bar is in conflict with the *Tani* case. There is no conflict. In *Tani*, the Court expressly relied on the fact that the district court had entered a default judgment in the case. *Id.* at 1169. The court noted that "judgment by default is an extreme measure and a case should, 'whenever possible, be decided on the merits.'" *Id.* at 1170 (quoting

Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam)).

The result in *Tani* was not dependent on the dismissal having been on a motion for a default judgment versus a motion for summary judgment. Rule 60(b)(6) can apply to any final judgment. In the case at bar, there was a ruling on the merits: the court determined that, as a matter of law, the Tucson Police Department had probable cause to arrest Cranmer. Cranmer is not entitled to relief due to gross negligence or attorney abandonment under Rule 60(b)(6).

CONCLUSION

There was probable cause for Appellant Cranmer's arrest by the Tucson Police Department. Probable cause was the determinative question on the merits of the summary judgment appeal. Cranmer's former attorney's alleged "abandonment" of Cranmer has no effect on the fact of probable cause. Thus the Court of Appeals did not abuse its discretion when it denied Cranmer relief pursuant to Federal Rule of Civil Procedure 60(b)(6).

Respectfully submitted,

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